

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-2410

BRLS

United States Court of Appeals

For the Second Circuit.

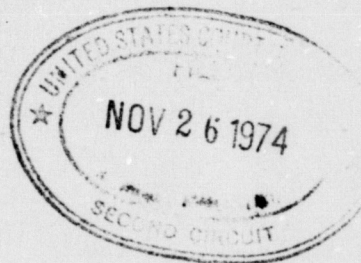
BERNARD KAMHI,

Plaintiff-Appellant,

-against-

MANNIE COHEN,

Defendant-Appellee.



Appellant's Brief

FRANK DELANEY

Attorney for Appellant

750 Park Avenue

New York, N.Y. 10021

(212) TR 9-4600

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a State Court Sequester who has made an ultra vires

TABLE OF CASES

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Matthews v. Matthews, 247 N.Y. 32, 34.

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Morris v. Alabama, 294 U.S. 587, 590.

Williams v. North Carolina, (1) 317 U.S. 287.

Williams v. North Carolina, (2) 325 U.S. 226, 236.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

BERNARD KAMHI,

Plaintiff-Appellant,

Docket No. 74-2410

-against-

MANNIE COHEN,

Defendant-Appellee.

-----X

APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Was Shirley Kamhi the plaintiff in an in rem judgment of divorce in which the New York Supreme Court, County of Kings, which appointed defendant herein a Sequester to seize and hold property of defendant in the said judgment for further order of the appointing Court, an indispensable party to an action brought by the owner of the property seized to declare ultra vires an original seizure by the Sequester, because first made subsequent to entry of the in rem judgment appointing the Sequester, whose omission as such indispensable party in the instant action constituted ground for dismissal of this complaint and this action.

2. Did the Court below while denying the motion

of defendant Sequester to dismiss the action for failure to state a claim upon which relief could be granted establish that the facts alleged in the complaint were, for the purposes of the motion to dismiss, valid, including the allegation of domicile of plaintiff in the State of Nevada, and that judgment in consequence was in rem because of service of process in Nevada.

STATEMENT OF THE CASE

This is an appeal by the plaintiff-appellant, BERNARD KAMHI, from an order of Judge Neaher in the United States District Court for the Eastern District of New York, made September 30, 1974. The motion of defendant-appellee was made on two grounds, (1) that the complaint failed to state a claim against defendant Sequester upon which relief can be granted, and (2) that plaintiff-appellant has failed to include Shirley Kamhi as an indispensable party defendant.

The order denied defendant's motion for dismissal on the first ground, but granted conditional dismissal on the second ground, unless plaintiff would sue Shirley Kamhi, the plaintiff in the judgment of the Supreme Court of the State of New York, County of Kings, as an indispensable party and serve an amended summons and an amended complaint joining her as a defendant.

The order of dismissal has become final except for this appeal, as plaintiff-appellant did not serve a sup-

plemental complaint upon Shirley Kamhi on or before the 31st day of October, 1974, the period allotted, for plaintiff-appellant's reasons, hereinafter stated.

The plaintiff-appellant has no objection and would not oppose voluntary application by Shirley Kamhi to become a party to this cause, but plaintiff-appellant has no cause of action as to the subject of this action against said Shirley Kamhi, and could not frame a valid complaint against Shirley Kamhi.

The complaint has been upheld against the Defendant-Appellee herein by the order of said Court, otherwise appealed from herein, insofar as it alleges and seeks relief from his ultra vires seizures of plaintiff-appellant's property after entry of a judgment in rem against plaintiff-appellant (therein defendant) without said property having been lienied or seized prior to entry of said in rem judgment. Order Appendix p. 92A.

Such determination has not been appealed from by either party hereto. Notice of Appeal of plaintiff-appellant p. 94A.

The appeal of plaintiff-appellant is from the dismissal of the complaint for failure to include the alleged indispensable party, Shirley Kamhi, as a defendant.

STATEMENT OF FACTS

The plaintiff-appellant alleged that his residence

and domicile in the State of Nevada has continued without interruption since October 13, 1973, and that he was deprived of his abode in the State of New York, that his substantial practice as a urological surgeon was destroyed, that he never thereafter had any abode in New York State, and has never intended to return to the State of New York, but permanently to be a domiciliary of the State of Nevada, and that he has not in fact ever returned to the State of New York. Complaint Appendix p. 1A. Plaintiff-appellant brought this action against defendant-appellee for the illegal attachment of his property by the sequester appointed by a judgment of the Supreme Court of the State of New York in which plaintiff-appellant never appeared or defended, which judgment he alleges is in rem and not in personam, the process in the New York action having been served upon him in the State of Nevada after months of his being domiciled there. Appendix p. 1A et seq.

These facts are alleged in the complaint, and on this motion, and as far as it sought to dismiss the complaint for failure to state a claim against defendant-appellee upon which relief can be granted, they must be deemed admitted. Also must be deemed admitted are the allegations of the complaint, Appendix p. 2A in paragraph IV, as follows:

"IV. The highest court of the State of New York, the Court of Appeals, holds that in the absence of in personam jurisdiction, founded on the domicile and residence of the defendant in the State of New

York, any seizure by a sequester subsequent to judgment is invalid, and there was no in personam judgment or jurisdiction, and the judgment of divorce in Nevada in favor of plaintiff, a permanent resident and permanently domiciled there, is entitled to Full Faith and Credit under the Constitution of the United States."

The findings of fact upon which the in rem judgment depends finds in Paragraph Sixth, Appendix p. 24A, that the plaintiff-appellant herein (defendant there) found that plaintiff-appellant (defendant there) departed the jurisdiction of the State of New York. The Court omits to state the date thereof, which, however, is alleged in the complaint to be prior to October 13, 1973, confirming plaintiff-appellant's allegation with respect thereto. Appendix 2A.

As the Sequester was first appointed in the said alleged in rem judgment, he could not have made any seizure as Sequester prior to the entry of the in rem judgment. Nevertheless, in excess of any legal authority which could be granted by an in rem judgment, the defendant-appellee Sequester illegally seized after entry of said judgment in rem certain property of plaintiff-appellant herein, not theretofore liened or seized. Appendix 28A.

The Sequester has seized other valuable property which has been previously liened with respect thereto, which no allegation of illegality is made in the complaint herein, 29A.

Plaintiff further alleges in the complaint that there was no in personam jurisdiction over plaintiff-appellant (defendant in the in rem judgment) under the Constitution and Laws of the United States, because he was a non-domiciliary of the State of New York when served with a New York Supreme Court summons in the State of Nevada on December 3, 1973, 3A.

The appeal of plaintiff-appellant is solely on that branch of the order which dismisses conditionally the complaint because of failure to include as a defendant an indispensable party, 94A. The time has elapsed to serve a new supplemental summons and complaint naming Shirley Kamhi as co-defendant, and thus the action of plaintiff stands dismissed but for this appeal, 94A.

ARGUMENT

Thus plaintiff's complaint herein to this point has been upheld as stating a good cause of action, but is dismissed because plaintiff-appellant did not sue said Shirley Kamhi, 94A. Thus the plaintiff-appellant has been denied the right to a trial on his complaint, found to state a good cause of action, unless he brings an action against Shirley Kamhi against whom he has no cause of action. She has made no illegal seizure; she has not made nor ordered the seizure which the Sequester has made ultra vires, and she has not been accorded any ownership or possession of said property.

Thus any action or complaint against her which the order below sought to compel plaintiff-appellant to serve against Shirley Kamhi would be subject to dismissal.

On the other hand, the Sequester has mistaken his authority and made a totally new or original seizure after entry of the in rem judgment. He has no identity with Shirley Kamhi. He has filed a \$25,000 bond as guarantee for the legality of his actions pursuant to the judgment of the Supreme Court of the State of New York, County of Kings, in the in rem action, 28A, and this bond does not run or extend to Shirley Kamhi because the Sequester and his duties and authority are unrelated to those of Shirley Kamhi. She is not the real party in interest in any sense. She has done nothing to create a cause of action against herself for the Sequester's actions.

The plaintiff-appellant is deprived of property by the Sequester of the Supreme Court of the State of New York, County of Kings, by actions to which the judgment of that Court did not extend under the laws and decisions of the Courts of the State of New York, and the Sequester's action is a violation of the Constitution and Laws of the United States in asserting in personam jurisdiction over a non-domiciliary and the taking of property without due process of law.

POINT I

DEFENDANT COHEN, THE SEQUESTER, MOVED
TO DISMISS THE COMPLAINT AND THE ACTION

ON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, WHICH PRINCIPAL BRANCH OF HIS MOTION HAS BEEN DENIED AND FROM WHICH DENIAL HE HAS NOT APPEALED, AND ARGUMENT BY PLAINTIFF-APPELLANT ON THAT POINT IS NOT DEEMED APPROPRIATE OR NECESSARY.

This branch of the motion was fully argued below, and the Court's decision was in favor of plaintiff-appellant and against defendant-appellee.

The Memorandum and Arguments of plaintiff-appellant below appear in the Record (Index Nos. 4,5,8,9,10) and fully cover this issue upon which the Court below upheld the complaint.

POINT II

THE RECORD IS TOTALLY DEVOID OF PROOF OR ARGUMENT IN SUPPORT OF THE BRANCH OF THE MOTION TO DISMISS ON THE GROUND THAT SHIRLEY KAMHI IS AN INDISPENSABLE PARTY.

This action is brought against the Sequester for transgression by him and no one else, of his authority pursuant to the in rem judgment in which he was appointed and for which he has filed a \$25,000 bond.

The Sequester has sequestered other valuable property liened or seized, actually or constructively, before entry of the in rem judgment, and his authority for and seizure of such property is not the subject of this complaint. The Keogh Fund, which is the subject of this action, was seized for the first time subsequent to the in rem judgment.

Any property the Sequester may sequester is not the property of Shirley Kamhi alleged to be the indispensable party by reason of the in rem judgment in the Supreme Court of the State of New York, County of Kings, but is only ordered "to be held by the Sequester until the further order of this Court," viz., the Court granting the judgment. Obviously, if the Sequester were to seize, even legally, say one million dollars, this does not automatically become the property of the Shirley Kamhi.

But Shirley Kamhi has not, in the premises which are the subject of this complaint, given rise to any cause of action which plaintiff can sustain against her.

As to property liened or seized prior to entry of the judgment, the Court has merely appointed a Sequester subject to a bond to hold property of a non-domiciliary legally seized, subject to its order.

This is the counterpoise of the case of Hart v. Feeley, 109 F.Supp. 3. In that case there was a guardian (a fiduciary) and a ward. Plaintiff therein sued the ward. The case was properly dismissed because the indispensable party was the fiduciary.

The Court said at: 109 F.Supp. 3, at p. 5:

"It was the guardian's rights and duty to prosecute any litigation for protection and maintenance of the ward's property rights.

The legal titleholder may sue in his own name without joining with him the party for whose benefits the action is brought."

Rule 17(a)(b) 28 USC, Sec. S754, 959(a).

Kelly v. Queenie, (D.C.N.Y.) 41 F.Supp. 1015.

A Sequester appointed in the Courts of the United States is vested with complete jurisdiction and control of all property he has legally seized, with the right to take possession thereof.

He has capacity to sue in any District, without ancillary appointment, and may be sued with respect thereto, as provided in Section 959 of this title. (28 US Code, Section 959).

Section 959 establishes the Sequester in the shoes of the owner or authority for the intervention thereon of the plaintiff in the in rem action.

And see Edward B. Marks Music Corporation v. Jerry Vogel Music Co., 47 F.Supp. 490,492, in which the Court held that if one acted as a trustee, the beneficiary is not a necessary party. The Court said on reargument at p. 492:

"As I have previously ruled, it seems to me the plaintiff in this case is really proceeding in its own behalf and as trustee for those who succeeded to the rights held by the co-author under the original copyright. As I view it, therefore, all of the necessary parties are before the Court either in person or through the plaintiff as trustee representing them.xxxxx"

Rule 17 of the Rules of Civil Procedure seems to make it clear that even a bailee of a bailor can sue, with

the implication that the bailee can be sued for illegal possession.

The instant case is much stronger. Shirley Kamhi cannot herself sue or be sued for the Sequester's acts. That is her prerogative and burden of the officer of the Court, the Sequester, for which he is required to put up a bond as a guaranty.

POINT III

THE EFFORT BY THE COURT BELOW TO COMPEL PLAINTIFF-APPELLANT TO SUE SHIRLEY KAMHI IS AN UNJUST BURDEN UPON PLAINTIFF-APPELLANT, PREVENTING HIS VINDICATING HIS LEGAL RIGHTS TO OBTAIN RELIEF FROM AN ULTRA VIRES ACT IF A SEQUESTER WITHOUT OTHER COMPLICATIONS.

That plaintiff's property was illegally seized by the defendant Sequester, and for purposes of this motion, this is the law of the case. Plaintiff-appellant should not be forced into a constitutional dispute with the Legislature of the State of New York.

New York State has passed two statutes designed to ignore domicile and hence jurisdiction.

Williams v. North Carolina, (2) 325 US 226; p. 231, there very succinctly holds in the prevailing opinion of Mr. Justice Frankfurter:

"For domicile is the foundation of probate jurisdiction as it is that of divorce."

Consequently, if New York lacks domicile, as in this case, it lacks jurisdiction to support an in personam judgment.

There is, however, a new statute stated to be effective only since June 7, 1974 after the final judgment in the instant case on April 25, 1974, reading as follows:

"Courts - Retention of Jurisdiction -
Matrimonial Act

Section 1, Subdivision (b) of section three hundred two of the civil practice law and rules is hereby relettered to be subdivision (c) and a new subdivision (b) is hereby inserted herein, in lieu thereof, to read as follows:

(b) Personal jurisdiction over non-resident defendant. A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony or alimony accrued under the laws of this state or under an agreement executed in this state."

It is in the opinion of plaintiff-appellant that this statute, ignoring domicile and jurisdiction, is a violation of the Constitution of the United States. But in this legal atmosphere in New York State, plaintiff is bound to consider the incidence of Section 303 of the Civil Practice and Rules reading as follows:

"Designation of attorney as agent for
service.

The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney

Appellant also cites EDWARD R. MARKS, JUDGE
appearing in the action or of the clerk
of the court if no attorney appears, as
agent, during the pendency of the action,
for service of a summons pursuant to
Section 308, in any separate action in
which such a person is a defendant and
another party to the action is a plaintiff
if such action would have been permitted
as a counterclaim had the action been
brought in the supreme court."

Again it is plaintiff-appellant's opinion that
this refers strictly to actions brought in the Courts of
the State of New York, and does not apply to actions brought
in the United States Courts simply because they may sit in
a district within the territorial limits of the State of
New York.

But it seems altogether unjust to put this burden
on a litigant involving recourse to the jurisdiction of the
United States Courts that sit in the State of New York by
reason of diversity of citizenship.

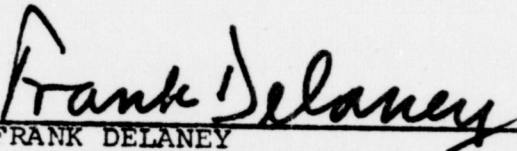
At any rate, plaintiff is not able to afford
protracted litigation on an issue which by inaction by
his attorney threatens to create in personam jurisdiction
over him, now wholly lacking.

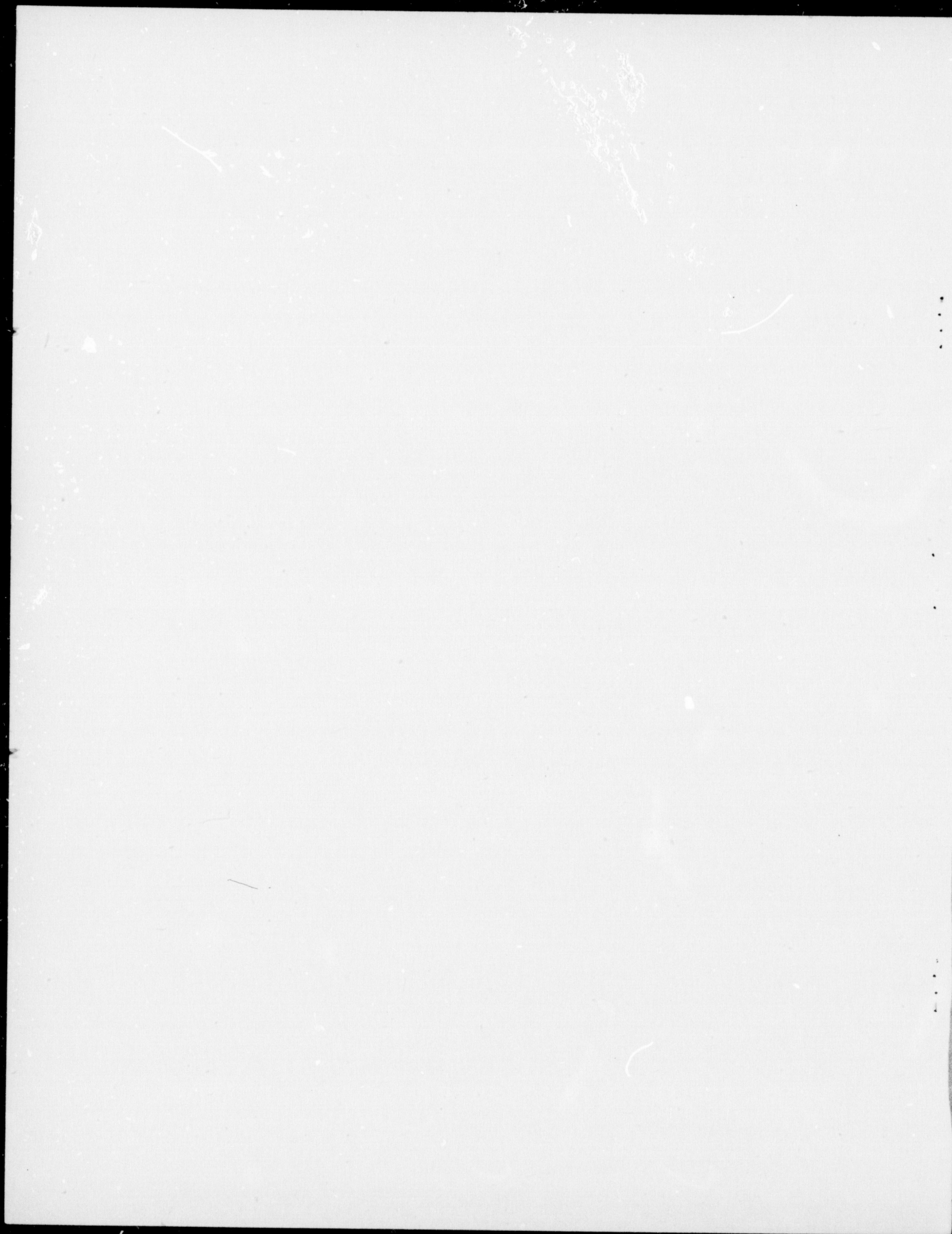
It is unjust to attempt to compel plaintiff-
appellant's attorney to include Shirley Kamhi as a defendant
against whom plaintiff has no cause of action, and so to
create jurisdiction over plaintiff in matters in which it
now wholly lacks. The result is to permit the seizure by

a State Court Sequester who has made an ultra vires seizure, so that the Sequester may profit by his illegal act and enjoy control of property illegally seized.

CONCLUSION

PLAINTIFF-APPELLANT REQUESTS THAT THE ORDER OF JUDGE NEAHER DISMISSING THE ACTION AND THE COMPLAINT BE REVERSED, AND ELIMINATION OF THE REQUIREMENT THAT PLAINTIFF SERVE AN AMENDED SUMMONS AND AN AMENDED COMPLAINT CONTAINING A CAUSE OF ACTION AGAINST SHIRLEY KAMIII AS AN INDISPENSABLE PARTY DEFENDANT, AGAINST WHOM HE HAS NO CAUSE OF ACTION, AND DEFENDANT SEQUESTER BE REQUIRED TO ANSWER THE COMPLAINT AND DEFEND THE ACTION.


FRANK DELANEY
Attorney for Plaintiff-Appellant
750 Park Avenue
New York, New York 10021
212/TR 9-4600



STATE OF NEW YORK)

: SS:

COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of Nov. 1974 deponent served the within Brief upon Arthur Hausman

attorney(s) for Appellee

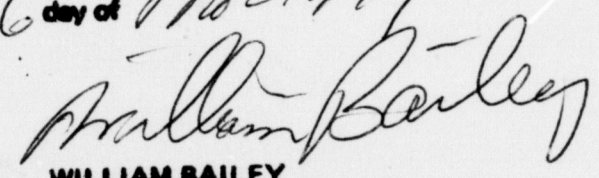
in this action, at

50 Court St.
Brooklyn NY 11201

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this
26 day of Nov 1974


WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976